No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.,
Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,
Appellee.

Appellants' Reply Brief

HARDIN, FLETCHER, COOK & HAYES
CARLETON L. RANK
925 Central Bank Building
Oakland 12, California

CYRIL VIADRO
635 Russ Building
San Francisco 4, California

Attorneys for Appellants

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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INTRODUCTION

The brief filed on behalf of Union is long; it covers sixty-eight pages to the forty-four pages of our opening brief; it cites one hundred and twelve cases to the sixteen cases cited in our opening brief and raises a number of issues which, to us, did not seem to be involved on this appeal at all.

What, to us, is most significant about that brief, however, is what it leaves untouched and unsaid.

It does not even mention *Crofoot v. Weger,* 109 Cal. App. 2d 839, 241 P.2d 1017, a case which we cited to this court as a "square holding on the subject" (page 22 of our brief) and as the case "closest on its facts to this case" (page 21 of our brief). Since it could not be distinguished from this case, no attempt was made by Union to distinguish it. It was simply ignored.

Nor does Union's brief mention the fact that, unlike the vendor in the usual case of a sale of real property, the vendor in this case had neither the right to sue for the balance of the purchase price nor even the right to sue for damages in the event of a breach by the vendee.

Similarly, little, if anything, is said about the fact that this is an action which *Union* brought; that it was Union which, having admitted its defaults, sought relief from the resulting forfeiture (120, 127) and that it was accordingly incumbent upon Union to show that it was entitled to relief.

Again, no attempt is made (except by the flat assertion that there was a forfeiture) to answer the contention that no forfeiture was proved since there was neither finding nor evidence as to either the value of the use of the land during the eight years that Union was in possession or the value of the more than 90,000,000 feet of timber which it removed.

Finally, nothing is said in the entire brief about the fact that we fully recognize that Union may be entitled to some relief.

Although it is our contention (a contention from which we do not recede and which it discusses very little) that Union came into court with hands so unclean (54 default notices, secreting information from both Ward and the trial court, deliberate perjury by its chief witness) that it should have been denied all equitable relief, we recognize that this court may conclude, as did the trial court, that Union is entitled to relief. To us, therefore, the real question which is raised on this appeal is as to the form which relief shall take if relief is granted for it does not automatically follow that Union is entitled to all of the relief which the trial court gave it if our contention is not well taken that it should be denied all relief.

For all that appears in Union's brief, however, there were only two choices open to the trial court and there are only two choices open to this court: to deny Union all relief and allow Ward to retain the land and the $585,000.00 which Union paid as well as to recover the value of the logs that were removed but not paid

for or to give Union the relief which the trial court gave it and allow it to complete the contract.

Thus, Union neatly bypasses and leaves unanswered the crucial contention raised in our brief, namely that, even if it is entitled to relief, the only relief which the trial court had the power to give it was relief against Ward's unjust enrichment by way of restitution of part of its payments.

Stripped down to its essentials, Union's position seems to be this:

(1) That the defaults which the trial court found to have been wilful were not wilful.

(2) That Ward waived his right to cancel the contract.

(3) That the default notices did not constitute the "written demand" required by the contract.

(4) That paragraph 12 of the contract is invalid and/or inconsistent and cannot be enforced.

(5) That Ward made an election of remedies which precludes him from terminating the contract.

(6) That, assuming that the defaults were wilful, Union was nevertheless entitled to the relief (by way of strict foreclosure) which the trial court gave it.

Each of the foregoing contentions will be answered in detail later on in this brief. A summary of our position as to those contentions now follows:

(1) The finding that the defaults were wilful is amply, in fact, overwhelmingly, supported by the evidence.

(2) Waiver requires full knowledge of the facts. Ward did not have such knowledge at the time when he assertedly waived his right to cancel the contract.

(3) The notices of default constituted a sufficient "written demand" under the terms of the contract. They were as specific as they could be considering that one of the defaults for which they were given was Union's failure to furnish Ward with the information that Ward would have needed to make them more specific.

(4) Paragraph 12 was neither invalid nor inconsistent at the time when the contract was entered into which is the time when the determination of its validity is to be made. In any event, however, the argument as to its invalidity or inconsistency is of no avail in this case, as Ward is not asking that it be enforced in strict accordance with its terms. Ward seeks no more in this action than the law would allow him if there were no paragraph 12, namely, that his title be quieted subject to his reimbursing Union such part of its payments as would leave him unjustly enriched if he were to retain it.

(5) No election of remedies was made by Ward as none was available to him. On the contrary, Ward sought the "sole remedy" available to him.

(6) Union was not entitled to the relief which the trial court gave it. The decree was not one of strict foreclosure. In any event, under the law of California, a decree of strict foreclosure cannot be granted in a case in which a time of the essence contract was cancelled by the vendor for a wilful breach by the vendee *except if the vendor himself requests such a decree.*

It is apparent that Union seeks to conceal the basic issue upon which this case rests, and upon which it was tried, behind a maze of technical issues, most of which were not even raised at the trial. To us, the one and only issue in this case is whether a wilfully defaulting vendee can be reinstated in his contract and allowed to complete the purchase of the property. That was the issue tried and argued in the court below and that was the issue which that court decided in its opinion and its judgment.

Before we proceed to answer Union's arguments in detail, some comment should be made upon some of the statements contained in Union's "Statement of the Case".

A number of questions are raised at the beginning of Union's brief as to the nature of the contract, the nature of the action, and the nature of the judgment from which this appeal was taken.

We do not believe that it is particularly material to determine

whether the contract was for the sale of land or for the sale of timber. It seems clear, that, if it be called a contract for the sale of land, it should be emphasized that this was neither residential nor ranching nor farming land. This was more like mining or oil producing land. Its value lay in the timber then ready to be logged and the main, if not the only, consideration that entered into the determination by the parties of the contract price was the amount of timber then on the land as disclosed by the French cruise which was available to both Ward and Union (528).

In fact, the very provision which precluded Ward from suing Union for the purchase price made it less of a contract for the sale of land and more of a contract for the sale of timber. In other words, the only obligation which Union actually undertook to perform was the obligation to pay for the timber which it removed. Conversely, the only right which Ward acquired was the right to be paid for the timber which Union removed.

It is true that Union also undertook to make minimum payments but it had it within its power, simply by logging the land, not to have to make any of the minimum payments with the exception of the first one. It is true too that Union had to make a deposit of $65,000 before it could begin to log so that in effect it had to pay in advance (rather than after their removal) for the last $65,000.00 worth of logs which it removed from the land. Considering that Union was to be in charge of the logging and that Ward could not effectively control its operations and the waste which might result therefrom, it is not surprising that payment for some of the logs was exacted in advance.

In fact, what happened in this case during the eight years of the contract makes the wisdom of the provision requiring a partial payment in advance quite apparent. On the basis of the cruise upon which both sides relied, there were 152,885,000 feet of redwood and fir on the land located in Township 12* at the time when the contract was entered into (Defendants' Exhibit O).

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*One thing may not yet have been made clear in the case. The contract covers land in Township 12 and land in Township 11. The two parcels are

At the time of the trial, there were approximately 37,000,000 feet of salvageable chunks, logs and timber left (724-5). Yet Union had reported or admitted the removal of only 93,000,000 feet (275). In other words, when the case went to trial, approximately 32,000,000 feet of timber were unaccounted for. Because Union reported an amount of fir in excess of that shown by the cruise, the figures as to the waste of redwood are even more impressive. On the basis of the cruise, there were approximately 121,000,000 feet of redwood in Township 12 when the contract was entered into. At the time of the trial, there were approximately 30,000,000 feet of salvageable redwood chunks, logs and timber left (724). Since Union had reported or admitted the removal of only 43,000,000 feet of redwood (Defendants' Exhibit O), approximately 48,000,000 feet of redwood timber were unaccounted for when the case went to trial.

There is no issue of waste in the case at this stage of the proceedings. It is apparent, however, that Union had it within its power to remove and pay for much less timber than would be missing from the land in the event that it ever reverted to Ward. It is to protect Ward against that contingency that Union was required to pay a minimum of $65,000.00 before it could start logging on the land.

As far as the nature of the action and of the judgment is concerned, there is no room for an argument on terminology. This *is* an action for reinstatement of the contract. This *is* an action which *Union* brought for relief from the cancellation of the

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approximately a mile apart and are separated by land owned by Sage Land and Lumber Co. The land in Township 12 has been completely logged by Union or its licensees, the land in Township 11 has not been logged at all. Union was logging in Township 12 at the time of the notice of cancellation and continued logging there until sometime in June of 1954 when the logging operations were completed. Township 11 is accessible only over the Sage lands, hence the attempt by Union in its complaint and at the trial to establish that a right of way over those lands had been created by agreement between Ward and Sage. Although Union is now technically in possession of the lands under this contract, it has done no logging there since June of 1954, the lands in Township 12 having been logged and the lands in Township 11 being inaccessible to it.

contract. Union's amended complaint makes that clear and so does the third paragraph of its brief (page two) where Union frankly admits that, "by its amended complaint", it "sought to be reinstated under the contract".

This is most emphatically not an action brought to *enforce* a forfeiture of Union's rights under the contract. Its rights were terminated on May 12, 1954. All that is involved in this litigation is the question of whether it is entitled to be relieved from the consequences of that termination. This of course includes a determination of whether the cancellation of the contract resulted in a forfeiture.

Finally, we believe that we *are* fully justified in stating that the judgment did reinstate Union under the contract. It was not a judgment of strict foreclosure, as Union would have this court believe, for such a judgment would not have provided, as this judgment did, that, if Union could not or would not pay the balance due under the contract it would be entitled to a refund of the excess of its payments over Ward's damages.

That is a feature which is never found in judgments of strict foreclosure. The very case of *Hansbrough v. Peck,* 72 U.S. 497, 18 L.ed. 520, upon which Union so strongly relies in a later part of its brief, makes it clear that, under the traditional common law rule, a vendee who fails to complete his contract is *not* entitled to a refund of his part payments. It is only under the modern California rule established by the cases cited in our opening brief that a vendee may, under certain circumstances, become entitled to such a refund. When he does become entitled thereto, however, it is by way of relief from the forfeiture which would otherwise occur.

Both the opinion and the findings of the trial judge make it clear that "reinstatement" is what *he* thought that he was giving to Union. Union concedes that the use of the term would be correct if it had been given a year instead of 45 days within which to complete the contract. It appears from the opinion, however, that Union itself argued that the entire purchase price should be paid immediately ("Plaintiff urges that relief can best

be afforded by ordering a conveyance of the land to him upon his immediate payment of the balance of the purchase price * * *" (139))*.

In other words, it is apparent that Union did not dare offer to pay less than the entire purchase price as a condition to the reinstatement of the contract. Under the circumstances, Union can hardly complain of our use of the word reinstatement to describe what the trial court did in this case, namely, allow the vendee, after a cancellation of the contract because of his wilful default, to pay the contract price and get the land.

Certainly, it is more accurate to describe the judgment as one of reinstatement than to describe it, as Union does on page 2 of its brief, as a judgment quieting Ward's title to the property.

We do not know whether the fact that the parties were or were not represented by legal counsel during their negotiations for the contract is particularly material at this stage of the proceedings. Since Union seems to consider it material (see page 4 of its brief), it should be pointed out that, although counsel for Union may not have participated in the negotiations, Union did have prominent counsel available at that time (591) and the record certainly does not show that the contract was not submitted to such counsel. At any rate, it is apparent from the entire record that Wilson, Union's president, was at least as experienced in timber matters as Ward or any of the attorneys representing Ward at the time. In other words, it can hardly be contended that Union was taken advantage of in the negotiations for the contract.†

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*See also the argument which Louis L. Phelps, Esq., one of the attorneys for Union, made at the end of the trial. It was not printed but is found in volumes 11 and 12 of the typewritten transcript. At page 1013 of volume 11, for example, Mr. Phelps proposed that Union be given a reasonable period of time to pay the entire balance due on the contract. At page 1016 of volume 11, he stated that he would like to sever the parties by paying the entire amount. He argued to the same effect the next day (page 45 of volume 12).

†That Wilson is an experienced and able businessman who does not allow himself to be taken advantage of was made a matter of judicial record approximately 20 years ago by the Supreme Court of Oregon in the case of *Union Bond and Trust Co. v. Gilbert*, 156 Or. 119, 66 P.2d 997.

Union's contention to the contrary notwithstanding, the quantity of logs removed, or reported as having been removed, could affect the purchase price. By wasteful logging or failure to report all logs removed, Union could have depleted the property and turned it back to Ward in its depleted condition while a substantial amount was still owing on the contract.

It is true that, because Union did not start logging in this case as soon as it could have, it paid Ward a substantial sum on account of minimum payments and in excess of the value of the logs which it reportedly removed. When the contract was entered into, however, it certainly was not clear that Union would not start logging as soon as the contract allowed it to. If it had done so, it could easily have impaired Ward's "security" removing logs worth far in excess of the $65,000.00 which it had deposited with Ward.

Since, under the terms of the contract, payments were not due until the 20th of the month following removal of the logs and a forfeiture could not be declared until 60 days thereafter, Union had a period of at least three and a half months during which it could log as it pleased before Ward had any right to cancel the contract. Thus, if the contract had not provided that Union should pay for all of the logs which it removed, Ward could well have found himself back in possession of land which was worth far less than when the contract was entered into and with no right of action for the difference between the value of the logs removed by Union and the $65,000.00 deposit which it had made.

Needless to say, it is not only at the beginning of the contract that Union could have logged so extensively and wastefully as to render Ward's "security" meaningless. It could have done so throughout the life of the contract.

We will cover elsewhere (as part of our argument on the issues of wilfulness and waiver) the other contentions that Union makes as part of its statement of the case.

After it had become apparent to Wilson and Owens that Ward was becoming suspicious, Wilson instructed Owens to send to Ward the pink slips covering the logs removed by Union in November and December (345). Under Wilson's instructions (350, 375, 376), Owens also sent a letter to Ward on February 16, 1954, advising him that, although only 11,797 feet had been reported for November and 257,519 for December, the total footage was actually 2,060,425 for November and 2,953,271 for December. (Defendants' Exhibit "S"). This letter was on Coast stationary; although it was the first time that Owens had reported any Union logs to Ward (350), he made no mention of the fact that these were Union and not Coast logs.

Wilson claimed at the trial that it did not occur to him even in February that Owens might similarly have failed to send the slips covering the period of June to October (656). It was too much to expect the court to believe, however, that a businessman in his position would not have asked Owens whether the Union logs for the earlier months had been reported to Ward.

In any event, Owens himself testified that Wilson had instructed him to forward *only* the November and December slips (376).

Much is made by Union in its brief of the fact that French and Harvey knew that Union was logging for its own account. Union accordingly argues that it could not have expected to succeed in concealing that fact from Ward and that, for that reason, its defaults must be held to have been the result of a misunderstanding. The point is, however, that neither Owens nor Wilson knew prior to the cancellation of the contract that information was being supplied to Harvey which could make Ward suspicious (386-8, 693-4).

As bearing on the wilfulness of the defaults, it must also be noted that, under specific instructions from Wilson, Owens refused to allow French to inspect the Union records that were available in Arcata (372). Union argues that its permanent records in fact were in Portland. The question is not, however, whether those records were in Portland or in Arcata. The question is simply

whether information was available in Arcata which could have been given to French and which would have immediately disclosed to him that the Union logs were not being reported to Ward. Such information was available in Arcata. Not only did Owens maintain a stumpage book there showing the quantity of logs removed daily but the Union pink slips were available there too and, as Owens himself testified, it would have been a simple matter to total them up on an adding machine (506).

The conclusion is accordingly inescapable that Union did try to conceal that information from French and Ward as it later did try to conceal it from the trial court.

Brief mention may also be made of the defaults as to taxes. Union again seeks to explain it as a misunderstanding due to the fact that the notice of default covering the 1953-4 taxes was sent on the day that Union paid the 1950-51 and 1952 taxes. What Union fails to mention, however, is the fact that the amounts were different and the further fact that on October 29, 1953 (10 days after Ward gave Union notice of default for the earlier taxes), one of Ward's attorneys sent a letter to Union covering the 1953-4 taxes and enclosing the tax bill (836-7). Union can accordingly hardly argue that it was not aware of the fact that it had two different tax liabilities.

As far as the issue of wilfulness is concerned, the most enlightening testimony is perhaps that of Paul Owens who kept the Coast and Union records in Arcata* and who, as we pointed out in our opening brief, was caught in deliberate perjury at the trial. Although we are confident that this court will wish to read all of his testimony, we will point out some of its high lights here.

On direct examination, Owens testified that the only records which he kept for Union were log haul records, log sales records and contract logger records. He kept no stumpage record (310-311). Early on his cross-examination, he testified again that he kept a stumpage book for Coast but not for Union (323) and that, after the girl in his office made the necessary entries in the three

*He had been employed by or had done work for Union since 1947 (323).

books which he kept, he mailed the white slips to Portland without using them for any other purpose (331). He further testified that he kept no record of cash deposits, cash receipts or anything else in that regard (342), that he had no records from which he could prepare a monthly recap of Union logs (345), that he prepared the letter of February 16, 1954, (Defendants' Exhibit S) from the pink slips as he had no record of the white slips (350), and again that he did not have a Union stumpage book (358-359).

He was then confronted with the photostatic copies of the Union stumpage book (Defendants' Exhibit T). At first, he denied that it had been kept in his office and stated that he could not recognize the writing and did not know who had prepared it (362).

The following day, however, Owens admitted that he kept the Union stumpage book and the Union cash book which he had originally denied keeping (364-370). The cash book was subsequently produced and is now Defendants' Exhibit X. He was excused from bringing the stumpage book as the photostats were in evidence but he testified that the book was exactly similar in form and appearance and was bound in the same way as the four books which were in evidence (361, 491).

Owens' testimony then changed and the true picture began to appear. For example, he had first testified that Wilson had told him to keep the Union pink slips because Union owed no stumpage on the logs as it owned the land. He now admitted that, when he had asked that question of Wilson, he, Owens, was talking about and had in mind the slips for the logs coming off the Ward property (377). Similarly, he had first testified that Wilson had told him to let French see all records (347). He now admitted that Wilson had in fact instructed him to let French see the Coast records but to tell French that the Union records were in Portland (372). Again, although he had previously testified that he did not keep a record of the white slips, he now admitted that he did (374).

Wilson followed Owens to the stand but neither denied nor explained nor commented upon any of his testimony.

Union also seeks to explain its defaults on the ground that it did not have the necessary funds available with which to make the payments to Ward (hence the attempt at the trial to hide the cash book which would have disclosed the true facts). That contention, however, is without any support in the record.

Union received stumpage payments from Coast weekly and currently (334-5, 383-4).

Moreover, Union was paid currently for the logs which it removed and failed to report to Ward (384-5). In fact, the record shows that Union was making a profit of $20.00 to $25.00 per thousand feet on the sale of those logs (688-692).

Union's cash book (the existence of which was originally denied by Owens (Defendants' Exhibit X)) shows the funds that were available to Union during the period of its defaults and makes it clear that Union could easily have made the payments had it chosen to. In fact, it shows that, during the period of June to October, 1953, Union diverted approximately $250,000 of the money obtained from the sale of logs to its Los Angeles and Portland accounts (495). In addition, funds were transferred to other Wilson enterprises (495).

We have no quarrel with the cases which Union cites and which define wilfulness. Assuming that its defaults were the result of an innocent mistake, Union argues that its conduct could not have been found to have been wilful under the definition contained in those cases. We may well agree. If its conduct had been the result of an innocent mistake, it would indeed not have been wilful. If it was as intentional and deliberate as the record shows it to have been, there is no doubt, however, that it comes fully within the definition of those cases and that the finding of the trial court is accordingly fully justified.

On page 19 of its brief, Union argues that the amount of its defaults, although substantial, was small when compared with the value of the property so that it is inconceivable that a businessman in Wilson's position would wilfully have failed to pay them and would thereby have jeopardized his rights under the contract. We

readily concede, as we did at the trial, that we never understood why Union allowed the defaults to occur. This does not mean, however, that they were not intentional.

We also recognize that the argument thus made by Union has a certain strength and appeal. We are confident that it will not impress this court any more than it impressed the trial court but we are nevertheless concerned about how best to answer it. Unfortunately, it compels us either to agree or to go outside the record in order to refute it. After considerable soul searching and being fully aware of the fact that, under normal circumstances, it would be improper for us to do so, we have concluded that we have no choice but to bring to the attention of this court one matter which is outside the record and yet throws considerable light upon Wilson's motivations. On July 20, 1956, Wilson was convicted in the District Court of the United States for the Northern District of California (Judge Goodman presiding) of wilful evasion of the payment of more than $100,000 in withholding taxes. The case was numbered 34803 in the District Court. It is now on appeal to this court although we understand that the record has not yet been docketed.

We realize that the matter is not final and that the judgment may be reversed. We do not bring it to the attention of this court in order to prejudice it against Wilson although we realize that our action may have that effect. Our purpose is merely to counter Union's argument that, under the circumstances of this case and with so much at stake, Wilson's default simply could not have been wilful.

Apparently, Wilson is the kind of man who likes to take this kind of chance. If he thought that he could "get away" with a failure to pay withholding taxes to the United States, it is not hard to believe that he also thought that he could "get away" with a failure to report and pay for some of the logs which he removed from Ward's land.

(2) There was no waiver by Ward of the right to cancel the contract.

That Union's contention on this issue is not well taken is made clear by the very first paragraph of its argument on the subject (page 26 of its brief). It is there said that the acceptance of any benefit or the assertion of any right under the contract, after a default giving the right to forfeit the contract, will constitute a waiver.

That is not a correct statement of the law. The acceptance of a benefit or the assertion of a right under the contract after such a default will constitute a waiver only if the benefit is accepted or the right asserted *with full knowledge of the right to declare a forfeiture.*

In *Goold v. Singh,* 88 Cal. App. 339, 263 Pac. 548, (one of the very cases relied upon by Union), for example, the Court stated at page 343:

> "A waiver, however, being the intentional relinquishment of a known right after knowledge of the facts (citation), the acts alleged to have had that effect must have been done with full knowledge of the right to declare a forfeiture * * *"

And in *German-American Sav. Bank v. Gollmer,* 155 Cal. 683, 102 Pac. 932 (a case in which the Supreme Court of California reversed a judgment based on a finding of waiver unsupported by the evidence), the Court stated at page 691:

> "It is not enough that a party might upon inquiry have discovered the fact. There must be actual knowledge of the fact."

None of the many cases cited by Union are to the contrary. Some emphasize the requirement of full knowledge of all the facts. See, for example, the excerpt from *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435, 6 P.2d 71, quoted at page 31 of Union's brief. Others do not find it necessary to mention it since there was in fact full knowledge of all the facts.*

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*When, for example, under a contract providing for monthly payments of $100.00, a vendor accepts one or more late payments, there can be no question of his having full knowledge of all the facts. This is a far cry, however, from the situation that was presented in this case.

It certainly is not true that, as contended in the last paragraph of page 32 of Union's brief, the acceptance of a payment under the contract was held, *without more,* to have waived the right to declare a forfeiture in each of the cases which Union cited on page 33 of that brief.

On the contrary, there *was* more than the mere acceptance of a payment in those cases. In each of them, the payment was accepted with full knowledge of all the facts.

We do not concede that, under the particular circumstances of this case and the particular terms of this contract, acceptance by Ward (with full knowledge of all the facts) of payments for some of the logs to which he happened to have title until they were paid for (clause eleven of the contract (20)) would constitute a waiver of his right to cancel the contract on account of Union's failure to report and pay for some other logs which it also removed from the land.

In any event, however, the waiver argument must be rejected on this appeal.

To us, it is clear that Ward did not have the necessary knowledge when he accepted the payments which Union claims that he could not accept and that, if a finding had been made on the subject, it could only have been favorable to him. The trial judge, however, made no finding on the subject. We can only conclude that he did not feel that Union was entitled to relief on that basis.

Be that as it may, however, at this stage of the proceedings, we are not concerned with the question of whether a finding of waiver would have been supported by the evidence.* As far as this court is concerned, the judgment can be upheld on the theory of waiver only if the evidence was such as to compel a finding that Ward waived the right to cancel the contract.

Since, to say the least, the evidence was in conflict on the sub-

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*The question of waiver is a question of fact (*Goold v. Singh,* supra, at 343).

ject, such a finding could in any event not be made now as a matter of law.*

Concededly, at the end of January of 1954, Ward knew that something might be wrong. That is why he started the investigation which eventually led to the discovery that something in fact was wrong, namely, that Wilson was neither reporting nor paying for some of the logs which he was removing from the land.

This was not a case in which the vendee was required to make fixed payments at fixed times and in which the vendor would accordingly know at all times whether the vendee was current or not. This was a case in which the vendee was required to report the varying amounts of logs which he removed each month and in which he was required to make payments only to the extent that he had removed logs from the land. Hence, the vendor could not know whether the vendee was current unless the vendee told him or unless the vendor himself took the time to investigate.

In this connection, it must be emphasized that Ward lived in Michigan, not in California.

Union argues at length that, because he employed French and Harvey, Ward must be held to have known currently the amount of logs which were actually being removed from the land.

The testimony is clear, however, that he did not. Neither French nor Harvey were employed for the purpose of checking the amount of logs removed by Union. They were employed to make sure that the logs were properly branded as between their respective owners, to limit waste in the logging operations and to enable Ward to determine how many logs Union actually recovered from a given location as compared with the amount of logs which, according to the cruise, could be recovered from that location (193-4, 203-4).

The Harvey reports themselves make it clear that they were not intended as a check on Union's reporting honesty. They classified the logs on the basis of the landings from which they were

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*It may incidentally be noted that both the California practice and the Federal Rules of Civil Procedure require that waiver be affirmatively pleaded (See *Wienke v. Rich,* 179 Cal. 220, 225, 176 Pac. 42; Rule 8(c) FRCP). It was not pleaded by Union.

removed as logs removed from the Ward lands (landings from which only Ward logs were being removed), logs removed from the Sage lands (landings from which only Sage logs were being removed), and logs removed from both the Ward and Sage lands (landings from which both Ward and Sage logs were being removed) (198-9, 212). Because of the Ward and Sage classification, the reports were thus the clumsiest device with which to attempt to ascertain the number of logs that were actually removed from the Ward lands (or, for that matter, from the Sage lands) and it is clear therefore that they were not prepared for that purpose.

Moreover, the question is not whether the necessary information as to Union's defaults could have been obtained from the Harvey reports. It is rather whether that information was in fact obtained from them. Ward testified that, because the reports did not provide him with the information in which he was primarily interested, he stopped looking at them (201-2, 208). His testimony on the subject certainly cannot now be disregarded as it would have to be if this court were to conclude that there was a waiver.

It must also be noted that the fact that there was a discrepancy between the Harvey and the Union reports did not necessarily mean that the Union reports were incorrect. It could mean that the Harvey reports were incorrect, a possibility which, needless to say, it was necessary to investigate.*

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*We do not consider the following facts to be particularly material but it should perhaps be noted, since Union attaches importance to the fact that French and Harvey may have known how many logs were being removed by Union, that neither knew how many logs were being reported 298, 409).

It should perhaps also be made clear that Ward did not start to check on Union's activities until the end of 1952 when French and Harvey were employed. The implication which is sought to be conveyed by Union's brief to the effect that Ward started policing the land in 1946 is not supported by the record. It is true that, at page 973, Ward testified that, since May 1, 1946, he had employed various persons to check the operations in the woods, etc. That testimony was given in connection with his expenses under the contract and was obviously intended to separate expenses incurred before the contract was entered into from those incurred thereafter. In fact, however, there was no investigation and no expense was incurred prior to the employment of French and Harvey.

The last notice of default under the contract was given by Ward on April 21, 1954 (Defendants' Exhibit AB printed in the Appendix to our opening brief). The record certainly does not require a finding that Ward had full knowledge of all the facts as of that time. Hence, no waiver resulted from the giving of that notice or from the acceptance of earlier payments made by Union (the last one was made on March 27, 1954 (Defendants' Exhibit I printed in the Appendix to our opening brief)).

In fact, the record compels the conclusion that Ward did not obtain full knowledge of all the facts until the early part of May of 1954 (265, 275, 957-8).

In the footnote to page 33 of its brief, Union also cites a number of cases in support of the proposition that the right to declare a forfeiture is waived by a failure to act promptly. Again, we have no quarrel with those cases. In this case, however, there most obviously was no failure to act promptly.

Finally, Union argues that it was entitled to assume that Ward would bring the defaults to its attention if and when he discovered them since, on previous occasions, he had brought errors in multiplication to its attention (270-1).

This, however, was not a mere error in multiplication discoverable and discovered by comparing the reports with the payments sent by Union and multiplying the reported footage of logs removed by $5.00. This was a wilful attempt to avoid paying for some of the logs by not reporting that they had been removed. Although it may be true that, on the issue of waiver, it makes no difference whether a default was or was not wilful, it would seem that Union can hardly rely in this case on the argument that, on a few previous occasions, Ward had brought discrepancies between the payments and the reports to its attention.

What Union is actually trying to have this court hold is that, instead of giving it a period of grace of sixty days, the contract gave it such period of grace as it could "get away" with. In other words, Union seemingly contends that, after receiving a notice of default for its complete failure to report and pay for the logs

which it removed during the previous month, it could cure that default by making a partial report and payment and it could then wait until such time as Ward discovered that the report and payment were only partial and gave it a further notice of default and another sixty day period of grace. In fact, carried to its logical conclusion, this would not even have to stop after the second notice of default. A further partial report and partial payment could further delay full compliance with the terms of the contract.

It is clear that such was not the intent of the contract. Union was to report and pay for the logs which it removed by the 20th of the month following their removal. It failed to report or pay for the logs which it removed during the period of June through October of 1953, and, in due course, it received a notice of default to that effect.

Thereafter, it was up to Union to see to it that the defaults were cured and the reports and payments made.

(3) The notices of default were sufficient.

Union next argues that Ward did not comply with the condition of the contract which would have enabled him to declare a forfeiture since he made no written "demand" for performance by Union.

This is another issue which was not raised in the pleadings, on which the trial court made no finding* and as to which Union can prevail on this appeal only in the event that the record is found by this court to compel the conclusion that the notices of default were insufficient as a matter of law. In our opinion, the record compels the conclusion that they were amply sufficient.

All 54 notices given by Ward were in the same form (defendants' Exhibit H). The notices given for the months of June through October of 1953 specified that Union was in default in three particulars: (1) failure to report, (2) failure to send scale slips and (3) failure to pay (90-98). Each notice also specifically

*It is not clear to us that the issue can even be said to have been raised at the trial.

called Union's attention to the time of the essence and cancellation clauses of the contract (clauses 19 and 12 (23 and 21)).

Union would have this court hold that the notices were faulty because they did not specify the amount due.

It is our position that the contract cannot be construed to impose such a requirement upon Ward. It could not require Ward to tell Union how much Union owed Ward since it contemplated that Union would know and Ward would not (or at least not necessarily) know how much that was and further contemplated that the necessary information on the subject would be furnished to Ward by Union. If Union's contention were sound, it could altogether have prevented Ward from declaring a forfeiture simply by keeping the necessary information from him.

On August, 1953, for example, when he gave notice to Union of its default in reporting and paying for the logs removed in July of 1953, Ward was in no position to be more specific than he was. Union did not furnish him with the information which would have enabled him to be specific as to the amount due for those logs until late in October of 1953 (278).

It should incidentally be noted that Union itself always acted on the assumption that the notices were sufficient. We realize that the fact that it always acted on that assumption would not necessarily make an insufficient notice sufficient. Our contention is merely that the notices were in fact sufficient and that Union recognized them as such.

It is also argued by Union that the notices did not even demand any performance on its part. It is true that they did not use the word "demand". With all due respect, however, we must ask what other purpose they could have had except that of demanding that Union perform its obligations under the contract. And that is the purpose which Union understood them to have.

We have no quarrel with the cases cited by Union in support of the proposition that there must be strict compliance with the conditions of a contract which are prerequisites to the declaration of a forfeiture. There was such a compliance in this case.

Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 167 Pac. 369, upon which Union primarily relies, is altogether distinguishable. That case did not deal with the sufficiency of the form of the notice but with the question of who were the parties who should give it. The notice in that case was given by two of three lessors. The court held that the lease required that all three lessors join in giving it and in declaring the resulting forfeiture.

None of the other cases cited by Union are in point. None involved the question of the sufficiency of a notice of default as a prerequisite to the cancellation of a contract. They accordingly can be of no assistance to this court in determining whether the 54 notices of default given by Ward to Union were sufficient demands for performance.

(4) Paragraph 12 of the contract is neither invalid nor inconsistent. In any event, it is certainly valid to the extent that Ward can be said to be seeking to enforce it.

Union contends that, under Section 1670 of the Civil Code, paragraph 12 of the contract is invalid.

It is our position that it is not invalid. Assuming, however, for the purpose of argument, that that part of paragraph 12 which provides for the retention of the amounts paid by Union would, under the circumstances existing at the time of the breach, be considered an invalid provision for liquidated damages, the fact remains that the judgment must nevertheless be reversed. This is for the simple reason that Ward is not seeking to enforce paragraph 12 in accordance with its terms. He seeks only to retain so much of the moneys paid and to be paid by Union as will not result in his unjust enrichment. In other words, he seeks only what the law would allow him in any event upon the cancellation of the contract.

Glock v. Howard, 123 Cal. 1, 11-12, 55 Pac. 713;

Tuso v. Green, 194 Cal. 574, 581, 229 Pac. 327;

Wilson v. Security-First Nat. Bank, 84 Cal. App. 2d 427, 432-3, 190 P.2d 975 (hearing denied).

Landfield v. Cohen, 89 Cal. App. 2d 177, 180, 200 P.2d 149 (hearing denied).

It is true that, in recent years, the Supreme Court of California has held that the defaulting vendee may be entitled to certain forms of relief to which he was not originally entitled. This has no bearing, however, on the question of whether the vendor has to rely on the contract to obtain the relief to which he is entitled.

Union begins with a comprehensive review of the remedies available in the event of a breach of contract in the course of which it advances the following propositions:

(1) That rescission and the recovery of damages are inconsistent remedies.

(2) That the remedy of damages is intended to give the non-defaulting party the benefit of his bargain and no more.

(3) That the remedy of termination of the contract and retention of the amounts paid is merely a substitute for the remedy of damages.

(4) That, being a substitute for the remedy of damages, the remedy of termination of the contract and retention of the amounts paid is inconsistent with the remedy of rescission and entitles the non-defaulting party to no more than the benefit of his bargain.

(5) That, in this case, Ward chose the remedy of termination of the contract and retention of the amounts paid rather than the inconsistent remedy of rescission and that he is accordingly entitled to no more than what he would have received had the contract been performed, namely, $750,000.00 plus such damages as the trial court awarded him.*

The question may well be asked as to why it was so important for Union to disassociate the remedy which the contract gave Ward from the remedy of rescission. The answer is of course that a party who rescinds a contract, unlike a party who seeks damages, may legitimately end up with more than he would have received if the contract had been performed.

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*It might be well to note that, since Wilson was not bound to complete the contract, the benefit of Ward's bargain was not to receive $750,000. It was rather to have the contract performed according to its terms *or* to get the land back in such condition as it might be.

To be specific, a vendor who sells a house for $10,000.00 and who thereafter becomes entitled to and does rescind the contract, will get his house back (upon refunding to the vendee whatever payment the vendee made) even though the house may then be worth $20,000.00. And the vendee is not allowed to complain in such a case that the vendor is getting more than he would have received if the contract had been performed.

No case need actually be cited in support of the foregoing proposition but it may be well nevertheless to refer to *Freedman v. The Rector,* 37 Cal. 2d 16, 230 P.2d 629, because that case exemplifies both what the vendee is and what he is not entitled to. As the court will recall, the vendee was given some relief in that case. He was given no part, however, of the increased value which the house had acquired between the time when the contract was entered into and the time when it was rescinded.

When the contract was entered into, the property was worth $18,000.00 of which the vendee paid $2,000.00 to the vendor. When the contract was rescinded, the property was worth $20,000.00. In the action that followed, the court held (for reasons which were discussed in our opening brief) that the vendor should refund to the vendee part of the $2,000.00 which the vendee had paid. The vendee was not allowed, however, to share in the increased value of the property (which is what Union claims to be entitled to do in this case).

Yet, it cannot be denied that the vendor did get more than he would have received had the contract been performed.

Thus, as is made clear by the long established rules pertaining to rescission as well as by the recently established rule announced in *Freedman v. The Rector,* supra, the protection to which the vendee is entitled in a case in which, as a result of the termination of the contract, the vendor retakes possession of the property is a protection against a loss and the imposition of a penalty. He is entitled to no more.

It is immediately apparent, however, that there is a great analogy between the objective which the courts seek to achieve in

cases in which the vendor claims damages and the objective which they seek to achieve in cases in which the vendor retakes possession of the property. Even though, in damage cases, the courts speak of not giving the vendor more than he would have received had the contract been performed, they are actually concerned only with protecting the vendee against a loss or a penalty. The courts are most definitely not concerned (just as they are not concerned in rescission or termination cases) with how much the vendee would have made had the contract been performed.

Applying the foregoing principles to the facts of this case, it is clear that the only question with which the trial court should have concerned itself was whether the termination of the contract would inflict a penalty upon Union. If it did penalize Union, however, it would be because it had received less than $585,000.00 worth of logs, not because the value of the land had doubled or quadrupled.

We now come to a closer analysis of the various contentions made by Union in part III of its brief.

We have no quarrel with the cases which Union cites on pages 38 and 39 of its brief. We recognize that a vendor who seeks damages is not entitled to recover, upon the breach of a contract, more than he would have received by the due performance of the contract. This, however, (and let it not be forgotten although Union never mentions the fact in its brief) is a case in which the contract denied the vendor the right to sue the vendee for damages.

And this is a case too in which the vendor was given the right of cancellation in the event of a default by the vendee. It is significant that, of all the cases which Union cites, not a single one holds that a provision for cancellation of the contract in the event of a default is invalid.* We readily concede that, in a given case,

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*Although Union seems to imply that it does (p. 43 of its brief), *McCarthy v. Tally,* 46 A.C. 583, 297 P.2d 981, does not hold that a cancellation provision is invalid. On the contrary, the court held that, on retrial, a provision for liquidated damages in the amount of $10,000 might be found valid. The court further held that no showing of actual damages need be made if the provision is otherwise valid.

the vendee may be entitled to relief including, if his default is not wilful, relief by way of reinstatement of the contract. At this point, however, we are merely dealing with Union's broad contention that the provision for cancellation of the contract, freely entered into by the parties, must automatically be disregarded. Such a contention is altogether unsound.

At page 40 of the brief, reference is made to the action to quiet title which Ward brought by way of cross-complaint as being "the relief" sought by Ward. It is our position that Ward did not seek any relief and particularly that he did not seek to have a judicial termination of the contract. The contract was terminated by its own terms and Ward merely asked the court to declare that it had thus been terminated.

Crowell v. City of Riverside, 26 Cal. App. 2d 566, 582, 80 P.2d 120;

Shaw v. Guaranty Liquidating Corp., 67 Cal. App. 2d 660, 663; 155 P.2d 53 (hearing denied).

At the bottom of page 40 of its brief, Union states that, if the value of the land exceeds the amount remaining to be paid on the contract, a decree quieting the vendor's title operates as a forfeiture and penalty. As we have already indicated, however, it operates as a forfeiture and penalty, if it does operate as such at all, not because the value of the land exceeds the amount unpaid on the contract but because the amount which was paid exceeds the value of the performance which the vendee received thereunder.

The fact that the value of the land exceeds the balance remaining due on the contract is completely immaterial and so is the fact that the property increased in value. Their only significance is that, at first glance, it may seem unfair to deprive the vendee of property worth more than the balance remaining due on the contract.

In this case, however, when it is remembered that it is not only the value of standing timber that skyrocketed during the last ten years, but also the value of the logs which Union removed from the land, it may be that much, if not all, of the apparent unfairness disappears. Although the record does not show how

much Union received for the logs which it removed between 1950 and 1954, it is not difficult to assume, in view of the apparent increase in the value of standing timber, that Union received considerably more for the logs than the $585,000.00 which it paid to Ward. The record does show that Union made a profit of $20 to $25 per thousand feet on the sale of the logs (690-692).

At page 41 of its brief, Union argues that paragraph 12 is in effect a provision for punitive damages which must be held to be void under Section 1670 of the Civil Code.

In our opinion, however, paragraph 12 can be sustained in its entirety as a valid provision for liquidated damages.

It is settled by the very line of cases which Union cites (see, for example, *Better Food Markets, Inc. v. American District Telegraph Company,* 40 Cal. 2d 179, 253 P.2d 10; *Atkinson v. Pacific Fire Extinguisher Company,* 40 Cal. 2d 192, 253 P.2d 18) that the determination of the impracticability or difficulty of fixing actual damages is to be made as of the time when the contract was entered into and that the fact that damages are readily ascertainable when the breach occurs makes no difference.

It would have been extremely difficult and impracticable when the contract was entered into in this case to fix the damages which might be incurred by Ward in the event of certain breaches of the contract by Union. This was not merely a contract under which Union agreed to pay for the logs which it removed. It was also a contract under which Union agreed to log the land in a certain way (clause 9(16-19)). It is apparent that it would have been extremely impracticable and difficult to fix the actual damages for a breach of the logging provisions of the contract. The same would be true in the event of waste committed by Union. Hence, paragraph 12 was valid in its entirety.*

*This Court will note that, in connection with its argument on this point, Union states that the party seeking to enforce a provision for liquidated damages has the burden of pleading and proving its validity and further argues that there is no such pleading or proof in this case (See pages 41 and 42 of Union's brief). As will hereinafter appear, however, the burden of proof in this case was on Union and not on Ward.

In any event, Section 1670 avoids a contract only *to the extent* that it provides for a penalty or punitive damages.

It is accordingly essential that we ascertain to what extent, if at all, compliance with paragraph 12 of the contract could result in a penalty or punitive damages.

It is clear that neither the cancellation of the contract and the repossession of the land by Ward nor the requirement that Union pay for all the logs which it removed could result in a penalty or forfeiture. It is only to the extent that the total payments made by Union might exceed the value of those logs that a penalty or forfeiture might conceivably result. It is accordingly only to that extent that paragraph 12 may be unenforceable.

In other words, if any part of paragraph 12 is unenforceable it is that part which allows Ward to retain the portion of the $585,000.00 which Union paid in excess of the value of the logs which it removed. That is the only possible penalty which may result from its enforcement. Ward, however, seeks to retain only so much of the $585,000 as will not result in a penalty.

We have no quarrel with the cases which Union cites on pages 42 and 43 of its brief. All are distinguishable since, in none of them, were damages difficult to ascertain.

Knight v. Marks, 183 Cal. 354, 191 Pac. 531, for example, was an action for rent in which the court held that the lessor could recover no more than the actual amount of unpaid rent and rejected his contention that he was also entitled to a deposit which the lessee had left with him as security.

In *Drew v. Pedlar*, 87 Cal. 443, 24 Pac. 749, a case in which the contract had been rescinded by the parties before the filing of the action, the vendee sought a refund of his down payment as against the vendor's contention that he could retain it as liquidated damages. The court pointed out that the vendor would certainly be entitled to recover such actual damages as he had sustained (he apparently sustained none as the property had greatly increased in value and was not asking for any actual damages). The court held, however, that the provision for the

retention of the down payment was in effect a penalty and accordingly gave judgment for the vendee.

The case is thus similar to *Freedman v. The Rector,* supra. It denies to the vendor the right to retain the payments made by the vendee to the extent that those payments exceed the vendor's damages and gives the vendee the relief to which we recognize that Union may be entitled.

In *Ricker v. Rombough,* 120 Cal. App. 2d Supp. 912, 261 P.2d 328, the lessor sued the lessee (who had vacated the premises before the expiration of the lease) for the entire balance of the rent under a provision of the lease which allowed the rent to be accelerated. The court held that the acceleration clause in effect provided for a penalty and refused to enforce it.*

By way of dictum, the court stated that the acceleration clause was rendered more difficult to uphold by the fact that the lease provided that the lessor could both terminate it and sue for all of the unpaid rent. This is altogether distinguishable from our case in which the contract denied Ward the right to recover the balance of the purchase price.

Moreover, even if the contract in this case were deemed to give Ward the equivalent of future payments (to the extent that the payments which Union made in the past were in excess of the value of the logs which it removed), it does not follow, although Union claims that it does, that the judgment should accordingly be affirmed. On the contrary, the cases relied upon by Union make it clear that the only effect of the rule against punitive damages should be to make the provision for retention of the payments invalid to the extent that they exceed the value of the logs removed.

We do not want to be belaboring the point but we must again emphasize that we fully recognized the possible applicability of that rule in our opening brief and continue to recognize it now.

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*The case of *Electrical Prod. Corp. v. Williams,* 117 Cal. App. 2d Supp. 813, 256 P.2d 403 is similar to *Ricker v. Rombough,* supra. It too involved a lease and an attempt by the lessor to enforce a provision for stipulated damages amounting to 75% of the rental for the unexpired term.

The best answer to Union's contention, however, is found in *Major Blakeney Corp. v. Jenkins,* 121 Cal. App. 2d 325, 263 P.2d 655 (hearing denied), one of the very cases upon which Union relies.

The action arose out of an escrow for the purchase of real property under the terms of which the vendee had made a deposit of $1,500.00 which the vendor was authorized to retain as liquidated damages in the event of a breach by the vendee. The vendee failed to pay the balance of the purchase price within the time specified by the contract. Having made a later tender, which the vendor refused to accept, the vendee filed an action for declaratory relief seeking a determination of the rights and duties of the parties under the terms of the contract.

The trial court quieted the vendor's title and refused to allow the vendee a refund of any part of his down payment. On appeal, the court held that the provision for the retention of the down payment by the vendor was invalid.

On the authority of *Freedman v. The Rector,* supra, it reversed the judgment to enable the vendee to make such showing as it was able to make to justify a refund of at least part of its down payment.

To that extent, the case does stand for the proposition for which it is cited in Union's brief, a proposition with which, as we have already indicated, we have no quarrel at all. What is significant about the *Major-Blakeney* case, however, as far as the determination of this case is concerned, is the fact that the court also held that, time being of the essence, the vendor had "justifiably terminated" (121 Cal. App. 2d at 331) the vendee's rights under the contract upon the vendee's default.* That is of course all that we contend for in this case.

The *Major-Blakeney* case also provides a complete answer to another of Union's contentions. The court held that the defaulting vendee had the burden of proof on the issue of the vendor's

*On the following page (332), the court stated that "the contract was no longer in force".

right to retain the down payment and that the vendor could retain it unless the vendee made a sufficient showing of unjust enrichment. In other words, Union's contention to the contrary notwithstanding, in a case such as this, the burden is not upon the vendor to show that the clause for liquidated damages is proper. The burden is on the vendee to show that it would be improper for the vendor to retain the payments made by the vendee.

Thus, far from supporting Union's contention that the judgment must be affirmed, the *Major-Blakeney* case supports our contention that, even though the provision for retention of the payments may be unenforceable to some extent, the provision for termination of the contract remains valid. The only issue with which the court can legitimately concern itself is therefore that of the relief to which the vendee may be entitled against the unjust enrichment of the vendor.

It should be noted that a hearing was unanimously denied by the Supreme Court in the *Major-Blakeney* case.

At page 45 of its brief, Union describes as unusual our contention that there was no proof in this case that the enforcement of paragraph 12 would result in a forfeiture since there was no proof of the value of the use of the property while it was in possession.

With all due respect, we stand on our "unusual" contention and we further submit that *Bird v. Kenworthy,* 43 Cal. 2d 656, 277 P.2d 1, fully supports it. Far from our having completely misconceived the holding of that case, we believe that the misconception is that of Union.

Union fails to mention the fact that the rescission by the buyer (which it regards as so significant) took place after he had tendered the entire balance due under the contract and the further fact that he sought a recovery in the alternative: either all of the money which he had paid or at least as much of that money as the court would give him *by way of relief from the forfeiture.*

The *Bird* case cannot be distinguished from this case on the ground that it involved a rescission by the buyer whereas this case does not. Let us suppose that the buyer had defaulted in his payments and the seller had repossessed the property (as happened in the *Bird* case). Let us suppose further that, without "rescinding" the contract, the buyer had then sued for a "relief from forfeiture" refund of all or part of his payments. That would have been the situation presented in *Freedman v. The Rector,* supra, and, under the rule of that case, the buyer should have been entitled to relief from the forfeiture *if, in fact, there was a forfeiture.*

Does Union contend that, in such a case, the buyer *would* have been entitled to the relief which the court denied him in *Bird v. Kenworthy?* Does Union mean to say that, in such a case, the buyer would have been allowed to argue that the seller was only entitled to the "benefit of his bargain"?

It is clear that, as far as the issue of relief from forfeiture was concerned, the question of whether the buyer had rescinded or not seemed completely immaterial to the Supreme Court of California. It is clear too that, as far as the question of whether there was a forfeiture in the first place is concerned, the fact that the buyer rescinded (which merely means that he chose not to proceed with his contract and notified the seller accordingly) is similarly completely immaterial.

As we did in our opening brief, we again urge this court to read the opinion of the District Court of Appeal in *Bird v. Kenworthy,* 265 P.2d 943, (another case which Union fails to mention in its brief). The court held that there could be no clearer case of forfeiture than that of a vendee deprived of property worth $28,000.00 at a time when only $5,000.00 remained to be paid under the contract.

Yet, that is the very decision which the Supreme Court of California would not allow to stand and, when it took the case over, it held that the vendee was not entitled to any relief since, in fact, there had been no forfeiture.

At page 46 of its brief, Union points out that it made substantial improvements to the land. We readily concede that roads were built although we do not concede (and the trial court did not find) that they were worth approximately $400,000.00.

Be that as it may, however, the fact that improvements may have been added to the property in no way affects the principles under which this case is to be decided. It can only affect the extent to which Union may be entitled to a refund of its payments.

Some comment may also be made on footnote 38 (page 44). In attempting to answer our contention that Union would not have sought to have the contract reinstated unless the present value of the property exceeded the amount remaining unpaid on the contract, Union argues that, by the same token, Ward would not have cancelled it had the present value of the property been less than the amount remaining to be paid. But, and this is a big "but", if the present value of the property had been less than the unpaid balance due under the contract, Ward would not have had the right, which a vendor ordinarily has, of suing for that balance. He would have been left to his sole remedy of retaking possession of the land and suffering the consequences of the decrease in its value. He would not have received the $750,000 which Union describes as the benefit of his bargain.

In the last paragraph of this section of its brief (page 47), Union asserts that a termination of its rights under the contract and in the land would have resulted in the most outrageous forfeiture.

Which we shall answer simply by asking this court to read the immediately preceding paragraph of Union's brief (that which begins at the bottom of page 46). It is there in effect recognized that there would have been no forfeiture if the trial court had granted to Union the relief (by way of restitution) to which Ward readily conceded at the trial that Union might be entitled.

We are thus brought back to the basic issue in this case which is not, as Union would have this court believe, whether the judgment should be affirmed or Union should be denied all relief, but

is merely whether Union is entitled to the relief which the trial court gave it or only to relief by way of restitution.

Union next contends that paragraph 12 is inconsistent because it allegedly gives Ward the right to cancel as well as the right to enforce the contract. Specifically, Union claims that the provision allowing Ward to recover the value of the unpaid logs is inconsistent with the balance of paragraph 12.

That contention is untenable.

Paragraph 12 was intended to achieve two objectives: To protect Union against liability for damages or for the balance of the purchase price in the event that it could not or chose not to complete the contract and at the same time to protect Ward against loss in the event that he had to take the property back.

In order to achieve the latter objective, paragraph 12 provides that, in the event of the termination of the contract, Ward shall be entitled to (1) the land in such logged-over condition as Union may choose to leave it and (2) the payments previously made by Union (which represent in part the value of logs which Union removed) and (3) the value of the unpaid logs.

It may be that, as we have already recognized, the provision for the retention of the payments previously made by Union is unenforceable to some extent. This does not mean, however, that the various provisions of paragraph 12 are inconsistent. In fact, they are not as they all are intended to achieve the same objective, namely, to give back to Ward the land which is his and the value of the logs which Union removed from that land.

The example which we previously gave in this brief will best demonstrate that the remedies provided by paragraph 12 are not inconsistent. Union could have begun heavy logging as soon as it had made the initial payment of $65,000 and could have logged for three or four months without paying. It could have removed $200,000 or $300,000 worth of logs (not to mention the waste that it could have committed while logging) before Ward could cancel the contract for its failure to pay for the logs removed

during the first month. Under those circumstances, it certainly could not be argued as a defense to an action for the value of those logs that the remedy was inconsistent with termination of the contract.*

The cases cited by Union are all distinguishable particularly in view of the fact (which we must again emphasize) that Ward does not seek to enforce all of the terms of paragraph 12 but seeks only to retain so much of the money which Union paid and to collect so much of the money still owing and unpaid as will not penalize Union. As we have already had occasion to demonstrate, that is a right which the law gives him independently of paragraph 12.

In other words, we concede that Ward is entitled to no more than the land and the value of the logs removed from the land and that Union was entitled to relief (unless precluded by the doctrine of unclean hands) in the event that it was able to show that the cancellation of the contract resulted in a penalty and forfeiture.

Under the circumstances, and in view of that concession, the cases cited by Union need not detain us.

None of them holds that a vendor of timber land who regains possession of the land in a depleted and logged over condition is not entitled to recover the value of the logs which the vendee removed while he was in possession.

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*It may be well to note that Wilson testified at the trial and now argues in his brief that Ward knew, in 1946, that he was in a financially precarious position (comparatively speaking at least) and understood that payments on the contract would have to be made out of the logs removed from the land. Under the circumstances, any provision that gave Ward less than what paragraph 12 gave him would have been extremely unwise.

In fact, it would seem that, under those circumstances, paragraph 12 was most fair to Wilson since it protected him against some of the risks with which he would have been faced had he bound himself to pay the entire purchase price.

(5) No election of remedy was made by Ward as none was available to him. On the contrary, Ward sought the "sole remedy" available to him.

Union contends that, by obtaining a writ of attachment under the third cause of action of his cross-complaint (in which he sought to recover money due him for logs removed and taxes), Ward made an election of remedies and waived the prior cancellation of the contract.

We have of course already demonstrated that there was nothing inconsistent in the various steps which Ward was entitled to take. Hence, his taking one of them could not waive the right to take another.

It is our position that Ward was entitled to the money for which he sued, that his right thereto arose under the contract but was not extinguished by its cancellation. It matters not whether, after the cancellation, it continued as an express or became an implied obligation on Union's part. The point is that, express or implied, it continued to be an obligation, that Ward was entitled to enforce it* and that, to do so, he had the right to a writ of attachment under Section 537 of the Code of Civil Procedure of the State of California and Rule 64 F.R.C.P.

There would seem to be no doubt that Ward is entitled to have the unpaid logs and the taxes credited against any money found to be due to Union by way of restitution. Nor can there be any question as to his right to collect for the logs. If, however, the contract did not give him the right to recover unpaid taxes, his attempted enforcement of that "right" could not constitute an election of remedies or a waiver of his right to terminate the contract.

Agar v. Winslow, 123 Cal. 587, 590-1, 56 Pac. 422;
Dickinson v. Electric Corp., 10 Cal. App. 2d 207, 211-12, 51 P.2d 205 (hearing denied);
De Hart v. Allen, 49 Cal. App. 2d 639, 646, 122 P.2d 273 (hearing denied).

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*It certainly was not necessarily apparent at the time the cross-complaint was filed (in fact, it is not necessarily apparent yet) that Union *will* be entitled to a refund. We merely recognize that it may be.

In the *Dickinson* case, the court held that the fact that the lessor had retaken possession of the premises and notified the lessee that he would relet for his account would normally have amounted to an election of remedies and precluded the lessor from suing for rent. Because the lease provided, however, that repossession and reletting would not operate as a termination of the lease unless the lessor so elected, the court held that the lessor was entitled to recover accrued rental under the lease.*

Similarly, in this case, Ward was entitled—as far as the rules as to election of remedies were concerned—to seek all the remedies (assuming there were more than one) provided for by the contract. He was accordingly entitled to a writ of attachment in connection with his money claim.

The cases cited by Union are all distinguishable.

In *Neet v. Holmes,* 25 Cal. 2d 447, 154 P.2d 854, for example, the lessor of a mining lease gave notice of rescission and thereafter continued for two years to accept the royalties due him thereunder. The court held that he had thereby waived his right to rescind.

It must be noted that the court did not hold that, if he had refused to accept the royalties, he would not have been entitled to compensation for the minerals removed from the mine by the lessee.

That he would have been entitled to such compensation is made clear by another case cited by Union, *Kern Sunset Oil Co. v. Good Roads Oil Co.,* 214 Cal. 435, 6 P.2d 71. In that case, the court held that the acceptance by the lessor of royalty payments under the lease up to and including three months after the commencement of the action was a waiver of his right to terminate the lease. At page 446, however, the court made it clear that, instead of accepting the royalties under the lease, the lessor could and should have made claim to the entire proceeds

*As a separate point involving another step taken by the lessor, the court also held that an attempt to assert a right which does not exist does not amount to an election of remedies.

from the sale of the oil. In other words, the court recognized that, if the forfeiture of the lease was justified, the lessor was indeed entitled to all of the proceeds from the oil. Had he sued for those proceeds, he would have been entitled to a writ of attachment.

Similarly, in this case, Ward was entitled to be paid for the logs whether his right to be paid arose under the contract or was implied by law upon its termination. In either case, he was entitled to a writ of attachment.*

Steiner v. Rowley, 35 Cal. 2d 713, 221 P.2d 9, another case relied upon by Union, is not to the contrary. The court held that the plaintiff, who had obtained a writ of attachment in support of the contract counts of his complaint under which he sought to recover $2,000, was not entitled to recover exemplary damages (in addition to the $2,000) on another count of his

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*As against a nonresident (such as Union), Section 537(2) of the Code of Civil Procedure of California allows an attachment in actions on contract, express or implied, regardless of whether the plaintiff has other security. As far as material, Section 537 provides as follows:

"§ 537. [When and actions in which attachments may issue.] The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

"1. [*Unsecured claims on contract.*] In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; provided, that an action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance, care or necessaries furnished to the other spouse, or other relatives or kindred, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section.

"2. [*Contract actions against nonresidents.*] In an action upon a contract, express or implied, against a defendant not residing in this State, or who has departed from the State, or who cannot after due diligence be found within the State, or who conceals himself to avoid service of summons."

complaint based on fraud. In effect, the court held that, since an attachment is not available in an action to recover exemplary damages, the plaintiff, who had obtained an attachment, had to give up his attempt to recover such damages. In this case, however, the remedy of attachment was available to Ward regardless of the theory under which he proceeded.

(6) Union was not entitled to the relief which the trial court gave it. The decree was not one of strict foreclosure. In any event, under the law of California, a decree of strict foreclosure cannot be granted in a case in which a time of the essence contract was cancelled by the vendor for a wilful breach by the vendee except if the vendor himself requests such a decree.

Union next contends that the judgment can and should be affirmed even though its defaults were wilful.

Union does not flatly take the position (which the trial court took) that the recent California cases dealing with relief from forfeiture form an adequate basis for the judgment. In fact, its position as to those cases is rather equivocal. At page 55 of its brief, Union states that the judgment can be supported by *Freedman v. The Rector,* supra, alone. At page 56, however, it states that the judgment is not a form of relief which originated with or is directly dependent upon the line of recent California cases to which *Freedman v. The Rector,* supra, belongs.

Instead, Union takes the position that the judgment can be supported as a judgment of strict foreclosure granting relief to Ward conditioned on Union's failure to pay the balance of the purchase price rather than as a judgment granting relief to Union.*

Conceding for a moment that a judgment of strict foreclosure could have been rendered in this case, it must first be pointed out that this was not such a judgment.

A judgment of strict foreclosure would have given Union a certain time to pay or be foreclosed. It would not have given

*It would almost seem as if Union is in doubt as to the soundness of the decision of the trial judge for how else can we explain its attempt to uphold the judgment on so many theories other than the theory which the trial judge adopted.

Union what this judgment also gave it, namely, the right to a refund of part of its payments in the event that it could not raise the necessary funds *or* in the event that it did not choose to pay at the expiration of the 45 days provided for by the judgment.

If a fire had destroyed the timber on the land during the 45 day period, Union would have been entitled, under this judgment, to ask for the restitution of the excess, if any, of its payments.* It cannot be denied that the latter form of relief certainly did originate with and is directly dependent upon the *Barkis*† line of cases. Moreover, it is not available to the vendee as part of a judgment of strict foreclosure.

In fact, however, whatever may be the rule in other jurisdictions, a judgment of strict foreclosure could not have been rendered in California in a case such as this.

This is a case in which the parties agreed that the contract could be cancelled in the event of the vendee's default and in which the contract was in fact cancelled on account of such a default. This is not a case in which the vendor asked the court to cancel (foreclose) the contract.

In fact, the parties expressly provided (by including a cancellation clause in their contract) that the vendor would not have to go through a judicial proceeding in order to be protected against the vendee's defaults.

This is not merely a question of who filed suit first. The contract made it unnecessary for the vendor to file suit. Thus, if he does file suit to quiet his title after the cancellation of the contract, as Ward did in this case by way of his cross-complaint, he is not asking the court to alter the status of the parties but merely to declare it.

Crowell v. City of Riverside, 26 Cal. App. 2d 566, 582, 80 P.2d 120;

Shaw v. Guaranty Liquidating Corp., 67 Cal. App. 2d 660, 663; 155 P.2d (hearing denied).

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*This incidentally points out another reason why the judgment is erroneous. It gives the wilfully defaulting vendee a choice of relief. The choice, if any is available, should be given to the vendor.

†*Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367.

It is true that, under certain circumstances (when the cancellation would result in a forfeiture), a court of equity will grant relief to the vendee. What Union is actually asking for in this case, however, is that the court rewrite the contract, pretend that it was not cancelled and thus compel the vendor to be the one who seeks relief. This, equity will not do.

Glock v. Howard, 123 Cal. 1, 9, 55 Pac. 713;
Pitt v. Mallalieu, 85 Cal. App. 2d 77, 86, 192 P.2d 24;
Landfield v. Cohen, 89 Cal. App. 2d 177, 180, 200 P.2d 149 (hearing denied).

In the latter case, while denying relief to the vendee less than ten years ago, the court forcefully stated at page 180:

> "Business transactions are not to be transmuted into amusement devices by the aid of judicial decrees. They are hedged about by legal rules and equitable principles, but unless those rules and principles are transgressed the law authorizes no interference by courts with the acts of the participants. To do so would constitute an interference with the freedom of contract, the boast of our economy, our culture, and our jurisprudence."

Again, we recognize that provisions for relief are now available but this does not mean that the contract cannot be cancelled, it only means that there may be *relief* from the cancellation.

Even in the event of a cancellation pursuant to the terms of the contract, the vendor is required to do equity if he is interested in having the court declare that the contract was cancelled. As pointed out in *Freedman v. The Rector,* supra, Section 3369 of the Civil Code precludes the court from quieting his title unless he refunds the excess of the vendee's payments over the damages caused by the vendee's breach. It is significant, however, that a refund of the excess of the payments is all that the court referred to as a prerequisite to the granting of a decree quieting the vendor's title.

The theory behind a decree of strict foreclosure is that a court of equity will not *terminate* the rights of the vendee (it will not

grant that form of relief to the vendor) without giving him an opportunity to pay. In this case, however, the contract was terminated before the parties ever got into court.

Although strict foreclosure is a form of relief available to the vendor, we do not mean to say that a court of equity will decree a strict foreclosure only when the vendor asks for it. There are indeed cases in which the vendor sought other relief (such as a decree quieting his title without giving the vendee either a refund or an opportunity to complete the contract) and in which the court rendered a decree of strict foreclosure at the instance of the vendee thus giving him the opportunity to complete the contract which the vendor sought to deny him.

The point is, however, that all the cases in which a strict foreclosure was thus imposed upon the vendor contained distinguishing features: In some of them, time was not of the essence. In others, there was a waiver of the time of the essence provision. In still others, there was no wilful breach.

Union argues that it does not usually appear in strict foreclosure cases whether time was made of the essence. We know of no case in which strict foreclosure was granted against the wishes of the vendor and in which it appears that time was of the essence. There are several such cases, however, in which it does appear that time was *not* of the essence.

For example, in *Keller v. Lewis*, 53 Cal. 113, which, as Union itself points out, is one of the leading cases on the subject, the basis of the argument made by prevailing counsel (for the vendee) was that time was *not* of the essence. The court held that the vendor was not bound to wait indefinitely for the vendee to perform under the terms of the contract. It fixed a deadline for him to comply (in effect, it made time of the essence) and thus made possible a cancellation of the contract in the event of his failure to do so. Unlike the vendor in this case, however, the vendor in *Keller v. Lewis*, supra, could not have cancelled the contract without judicial intervention.

The fact, which Union emphasizes, that some of the cases in which it does not appear that time was of the essence rely on *Hansbrough v. Peck,* 72 U.S. 497, 18 L.ed. 520, a case in which time was made of the essence, cannot be too important in view of the fact that *Keller v. Lewis,* supra, in which it does appear that time was not of the essence, also cites and relies on *Hansbrough v. Peck,* supra.

We are yet to find a case in which the vendee succeeded in having the court decree a strict foreclosure against the wishes of the vendor and in which the contract contained a cancellation clause in the event of default by the vendee. In *Veterans' Welfare Board v. Burt,* 4 Cal. App. 2d 659, 41 P.2d 587, a case in which, according to Union, the vendor was authorized by a State statute to cancel the contract in the event of the vendee's default, the trial court did *not* decree a strict foreclosure and the judgment was affirmed on appeal as against the vendee's contention that he should have been given some time within which to complete the contract.

Finally, we are yet to find a case in which strict foreclosure was decreed at the instance of the vendee and against the wishes of the vendor and in which the breach by the vendee was wilful.

Union argues that the question of wilfulness is never an issue in strict foreclosure cases and that, in fact, it is often apparent that the breach involved in those cases would have been found to be wilful if wilfulness had been an issue. In support of that proposition, Union refers to *Cross v. Mayo,* 167 Cal. 594, 140 Pac. 283. This, however, was an action brought by the vendor "to obtain a decree declaring and adjudging that defendant had failed to perform his part of a contract for the purchase * * * of certain real property of plaintiff, fixing a time within which he should so comply, and decreeing that if he did not so comply within said time he should be forever foreclosed of all right or interest in the property or to a conveyance thereof" (167 Cal. at 595).

In other words, strict foreclosure was all that the vendor sought in that case and that is what the court gave him but the case certainly does not stand for the proposition that a wilfully defaulting vendee in a contract in which time is of the essence can insist upon being allowed to complete the contract.

In *Wilson v. Beazley,* 186 Cal. 437, 199 Pac. 772, upon which Union similarly relies, the court held that, because there was no privity between him and the assignee of the vendee, the vendor was not entitled to specific performance (the remedy which he sought). Instead, the court directed that a judgment of strict foreclosure be entered requiring the assignee to pay the balance due within a reasonable time and terminating his rights in the event of his failure to do so.

It appears from the opinion that the land was worth $4,000 and that the balance due on account of the purchase price was $4,726.95. That was of course the reason why the vendor was more interested in the purchase price than the property.

The case certainly does not stand for the proposition, as Union would have this court believe, that the wilfully defaulting assignee of the vendee (or the wilfully defaulting vendee) may insist upon the right to complete a contract which the vendor has justifiably terminated.

The case of *Petersen v. Ridenour,* 135 Cal. App. 2d 720, 287 P.2d 848, upon which Union also places strong reliance not only does no violence to any of the foregoing principles, but in fact strongly supports our position.

The case involved an obviously innocent mistake on the part of the vendee in addition to some equally obvious elements of waiver on the part of the vendor.

The court first restated the rules relating to relief from forfeitures announced in the recent California cases cited in our opening brief. Citing *Bird v. Kenworthy,* supra, it pointed out that there can be no relief from a forfeiture without a showing by the vendee as to the value of the property at the time of the default as well as the value of its use while it was in his possession.

Although the vendee had not made such a showing, the court nevertheless concluded, and rightly so, that, under the circumstances of the case, equity could not allow the vendee to lose his home without an opportunity to pay the amount due. For a period of four years, he had made payments which he thought were proper and which were accepted by the vendor. Suddenly, however, the vendor demanded large additional payments and gave notice of default. The court in effect held that the vendor had waived the time of the essence provisions of the contract and could not reinstate them without reasonable notice to the vendee. The court stated at page 729:

> "Though the evidence was ineffective for the purpose of varying the terms of the contract, defendant's testimony that he was told and believed that the $100 monthly payments would include all interest, taxes and insurance, has a legitimate bearing upon this question of what the equities were in the matter of giving him an opportunity to cure his defaults—especially when it is considered in the light of plaintiffs' own understanding and his acceptance, without interest and without a murmur, of defendant's payments, which were first declared inadequate on August 10, 1952, almost four years after the payments began. * * * Defendant said in his answer that he would pay any adjudged deficiencies. Though there was no plea of waiver or estoppel, the facts above reviewed made it legally impossible for plaintiffs to take snap judgment on defendants and thereby to forfeit their interest without any previous opportunity to make good—to save their home. (See *Boone v. Templeman,* 158 Cal. 290, 294-295 (110 P. 947, 139 Am. St. Rep. 126); *McCartney v. Campbell,* 216 Cal. 715, 720 (16 P.2d 729); *Gonzales v. Hirose,* 33 Cal. 2d 213, 216 (200 P.2d 793); *McLane v. Van Eaton,* 60 Cal. App. 2d 612, 616 (141 P.2d 783); 66 C.J. par. 383, p. 782.)"

This court will note that all the cited cases (and they are the last cases cited in the opinion) were waiver cases.

The superseded opinion of the Supreme Court of California in *Weil v. Barthel,* 279 P.2d 544, merely held that a decree in a previous action was a decree of foreclosure by sale (as contended

by the vendee) rather than a decree of strict foreclosure (as contended by the vendor) and that, under an applicable California statute, the vendee was entitled to a period of redemption. We do not believe that the opinion can be relied upon for any purpose (see *Miller & Lux Inc. v. James,* 180 Cal. 38, 48, 179 Pac. 174; *Hopkins v. Southern California Teleph. Co.,* 275 U.S. 393, 400, 72 L.ed. 329) but, if it can be relied upon, it is for the proposition that there can be no redemption unless allowed by statute.

In this case, there is no statute other than Section 3275 of the Civil Code of which Union could attempt to avail itself to effect a "redemption." Since its breach was wilful, however, it cannot claim relief under that section.

In the final analysis, the conclusion is inescapable that, whatever may be the scope of the availability of strict foreclosure as a remedy to the vendee, it cannot be available to him, as contended by Union, in all cases of default. If the vendee were allowed in all cases to complete the contract by way of a strict foreclosure, there would be nothing left of Sections 3275 and 1492 of the Civil Code. Moreover, if he were entitled to insist on strict foreclosure in all cases, there would have been no need for the Supreme Court to develop the *Barkis* line of cases.

We argued at length in our opening brief that Union had come into court with hands so unclean that it should have been denied all relief. Union has in no way attempted to answer that argument except of course by attempting to show that its defaults were not wilful. We must accordingly assume that it concedes that, if this court agrees with our evaluation of the evidence, it should be denied all relief.

It may be too that relief should be denied Union on an entirely different basis. In view of the provisions of paragraph 12 of the contract, specific performance could not have been granted Ward against Union. The doctrine of mutuality of remedy should preclude Union from getting relief so akin to specific performance.

Sturgis v. Gallindo, 59 Cal. 28, 32;

Dabney v. Key, 57 Cal. App. 762, 765, 207 Pac. 921;
Moore v. Heron, 108 Cal. App. 705, 709, 292 Pac. 136;
George v. Weston, 26 Cal. App. 2d 256, 263, 79 P.2d 110 (hearing denied).

We have it deemed unnecessary to lengthen this brief with an analysis of the cases from other jurisdictions which Union cites in the last section of its brief. The law of California seems so clear to us that it matters not whether cases from other jurisdictions are distinguishable on their facts.

We stand squarely on the law of California and particularly on the case of *Crofoot v. Weger,* 109 Cal. App. 2d 839, 241 P.2d 1017, which Union has so far been unable to distinguish.*

CONCLUSION

The argument that a person who has paid $585,000 on account of a $750,000 purchase should be allowed to complete his contract is obviously appealing and obviously appealed to the court below.

As applied in this case, however, it forced the trial court to ignore altogether the rules of law which should have governed its decision and to disregard cases such as *Crofoot v. Weger,* supra, in much the same way as Union was forced to disregard it in its brief.

As applied in this case, the argument also does violence to the true equities of the situation. Union admittedly removed over 90 million feet of logs on which it made a net profit as high as $20 or $25 per thousand feet. Because the trial judge did not care to hear testimony on the subject (683-692), the record does not show the total profit that was made on the operation but it is obvious that Wilson and the various companies which he controls must have received benefits far in excess of the $585,000 that were paid to Ward. In addition, some 48 million feet of redwood timber

*We stand too on *Palmer v. McArthur,* 99 Cal. App. 510, 514, 278 Pac. 1049, a case which we discovered only after the filing of our opening brief and in which, in an action to quiet title by the vendor, the court refused all relief to the vendee whose defaults were found to have been wilful and affirmed the judgment quieting the vendor's title.

that were on the land on May 1, 1946, are unaccounted for. We assume that that timber was destroyed in the course of wasteful logging rather than removed and left unreported. But the fact remains that it is no longer on the land.

Thus, the equities of the situation are far less one sided than may appear at first, assuming that they are one sided at all.

Someone stands to profit from the ultimate decision in this case since the land is worth more than the balance due on the contract. The question is as to who, in equity, should get the profit, the wilfully defaulting vendee or the innocent vendor.

Sometimes, in hardship cases—for example, when a house is about to be lost—a court will strain itself, the facts and the law to reach a decision that will result in saving that home for the family which lives there. **But never to insure a profit to a wilful wrongdoer. And particularly not, as was done in this case, to insure him a profit if, at the time of judgment, the value of the property has gone up and insure him against loss if the value has gone down.**

We respectfully and earnestly urge this court to consider this case on the basis of the rules of law and equity presented to the trial court and upon which it sought to base its decision. If we are right, as we believe that we are, in our understanding of those rules, the judgment should be reversed with instructions to the trial court to either (1) enter judgment quieting title in Ward and awarding him so much of the amount claimed in his cross-complaint as is proper or (2) try the issue of unjust enrichment under the rules laid down in *Bird v. Kenworthy*, supra, and quiet Ward's title on condition that he refund to Union such amount, if any, as would leave him unjustly enriched if he were to retain it.

Dated: Oakland, California
September 7, 1956

Respectfully submitted,

HARDIN, FLETCHER, COOK & HAYES
CARLTON L. RANK
CYRIL VIADRO
Attorneys for Appellants